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No. 84-1097

In The
Supreme Court of the United States
October Term, 1984

S. SIMCHA GOLDMAN,
Petitioner,

v.

CASPER W. WEINBERGER,
SECRETARY OF DEFENSE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Twice in his Brief in Opposition, the Solicitor General refers to the "study" now being conducted by the Department of Defense over conflicts between religious tenets and military requirements (Br. in Opp. 7, 11-12). He argues that this procedure, mandated in the Department of Defense Authorization Act, 98 Stat. 2532, "offers the greatest promise for achieving a fair and consistent, yet militarily feasible and justifiable, policy toward religious accommodations in the armed forces." Br. in Opp. 12.

In fact, the "study" did not originate with the armed forces. It was accepted by the military only as a means of

avoiding legislation that would have squarely overruled the decision below. Appendix I to this Reply Brief is a copy of an article that appeared in *The Washington Post* of June 6, 1984, reporting on the extensive pressure placed on legislators who attempted to enact a law overruling the conclusion reached by the Court of Appeals. Such a law was, in fact, adopted on the floor of the House of Representaives, 130 Cong. Rec. (daily ed.) H4839, May 24, 1984. When the armed services' efforts to scuttle all proposed legislation failed, the Department of Defense urged a "study" of the subject.[1] It is the opinion of undersigned counsel, who personally appeared before the study group, as well as the opinion of others who have presented the views of religious minorities to that group, that no change in the heretofore inflexible position of the armed forces is likely. This Court should not, we submit, permit the judgment below to stand merely because of an unsubstantiated

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[1]When Senator Hatch accepted the armed services' "study" alternative, he stated on the floor of the Senate (130 Cong. Rec. (daily ed.) S7421, June 15, 1984):

> In offering this legislation and directing that the military service conduct a thorough study of this subject and that t. ey issue appropriate regulations, I do not mean to suggest that the basic, underlying constitutional question should not be decided promptly by the courts in favor of religious freedom. I think it is important that the court of appeals consider the Goldman case en banc, and I would hope that the full Court would reverse the unfortunate decision of the lower *[sic]* court. I also hope that if the court of appeals does not so rule, the Supreme Court of the United States grants certiorari and reverses the Goldman decision.

Senator D'Amato thereafter indicated that he would have preferred the bill enacted by the House, but that he believed the "study" proposal was "the most specific measure we could expect to pass the Senate" because of the opposition of the armed services. *Id.* at S7422.

possibility that the regulations "may be modified without the need for constitutional adjudication." Br. in Opp. 12.

Indeed, this Court is not powerless to remove this case from its docket if the constitutional issue is ultimately mooted by a change in the regulations *after* certiorari has been granted. Should our prediction concerning the study group prove wrong — *i.e.*, should the group propose, and the military services adopt, amended regulations that permit military personnel to practice innocuous and inoffensive religious tenets such as the wearing of a yarmulke — we will promptly notify the Court and, if it is then deemed appropriate, the writ could be dismissed. A denial of certiorari at this juncture, on the other hand, would simply be taken by the armed services as judicial ratification of the policy sustained by the court of appeals and as a signal that no modification of the regulations is warranted.

2. The Solicitor General chides us for failing "to take into consideration the inherent distinctions between civilian and military life." Br. in Opp. 11. But we did note that this Court has repeatedly said that there are limits to the restrictions that may constitutionally be imposed on the military. See Pet. 6-7. And the Solicitor General fails to distinguish between restrictions on fundamental First Amendment liberties and limitations on more generalized interests in personal grooming. *Kelley* v. *Johnson,* 425 U.S. 238 (1976) — cited as primary authority in the Brief in Opposition (pp. 4-5) — involved a claim based on a Fourteenth Amendment "liberty" in "matters of personal appearance." 425 U.S. at 244. The Court noted that this claimed constitutional interest was different in kind from the privacy interests asserted in earlier cases culminating with *Roe* v. *Wade,* 410 U.S. 113 (1973). And *Kelley* v. *Johnson* surely did not hold that a specific First Amend-

ment free-exercise claim could be overriden by a police-force regulation governing personal appearance and grooming.

Nor is *United States* v. *Lee,* 455 U.S. 252 (1982), on which the Solicitor General relies (Br. in Opp. 7-8, 9), controlling here. This Court found in *Lee* that there is a broad public interest in "a sound tax system" that cannot be accommodated by permitting religious exemptions from the obligation to pay a tax. The Court said, "The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." 455 U.S. at 260. No similar compelling interest and – more importantly – no significant harm resulting from an exemption can be asserted in the present circumstances. Perfect uniformity of dress in the military is not as essential to the nation as the functioning of the tax system, and allowing minor, virtually unobtrusive variations from strict uniformity of dress would surely not prevent the military from functioning.

3. Finally, the horrible spectre that "many religious adherents" would make demands for exemptions from the dress requirements (Br. in Opp. 5) rests on no factual basis whatever. It is simply a pretext for denying a fundamental right of conscience when no cognizable harm can be shown to result from recognition of the specific right asserted. The absence of any "clinical or other studies" by the military – that was noted by the district court – is surely relevant to this aspect of the respondent's constitutional justification. Excusing the Amish, on constitutional grounds, from certain formal schooling (*Wisconsin* v. *Yoder,* 406 U.S. 205 (1972)) did not produce a flood of

parents seeking similar exemptions. The constitutional obligation to grant unemployment benefits to Sabbath-observers who reject Saturday work for religious reasons (*Sherbert* v. *Vener,* 374 U.S. 398 (1963)) or to religious observers whose faith keeps them from accepting certain kinds of employment (*Thomas* v. *Review Board,* 450 U.S. 707 (1981)) is not overridden by the frightening prospect that others may choose such a course to shirk honest labor. By the same token, the liberty of an Air Force psychologist to wear a small religiously commanded skullcap should not be overriden because of sheer surmise that there might be others making similar claims for variant dress that would seriously interfere with the exercise of military duties.

CONCLUSION

For the foregoing reasons and those stated in our Petition, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

The Washington Post, June 6, 1984, Page A2

DRESS BATTLE

Pentagon Up in Arms for Uniformity As Yarmulke Issue Gains in Congress

By Margaret Shapiro
Washington Post Staff Writer

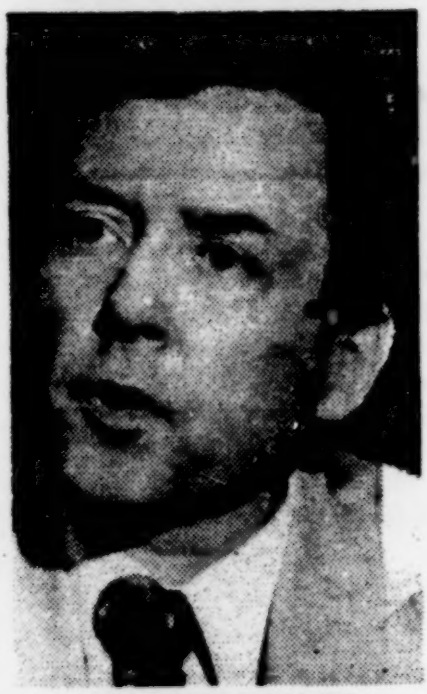
The military is proud of its uniforms, and one of the things it likes most about them is their uniformity.

So the Pentagon was greatly disturbed last week when the House passed an amendment to the defense authorization bill allowing members of the armed forces, on a one-year trial basis, to wear "unobtrusive religious headgear," such as Jewish skullcaps or yarmulkes.

When Sen. Orrin G. Hatch (R-Utah) picked up the issue in the Senate, the Pentagon panicked.

"To them it's the slippery slope, a Pandora's box that, once opened, can't be closed," said the aide of one senator backing the yarmulke amendment. "If Orthodox Jews wear yarmulkes, then Rastafarians will wear dreadlocks and smoke dope on coffee breaks and Hare Krishnas will wear their saffron robes when they're out fixing a helicopter."

Hatch's proposed amendment was sparked by a federal appeals court decision here last month. The court, considering the case of an Air Force captain who was disciplined for wearing a yarmulke, ruled that the armed forces have the right to determine dress for those on active duty.



SEN. ORRIN G. HATCH
... stand is under siege by Pentagon

Many Jewish leaders were upset about the court decision. In response, Rep. Stephen J. Solarz (D-N.Y.) introduced the House amendment, which easily passed during recent consideration of the fiscal year 1985 defense authorization bill.

Hatch sent out a "Dear Col-

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league" letter this week, seeking support for an identical amendment when the Senate debates the defense bill, possibly this week.

The Pentagon quickly counterattacked. Over the past two days, Hatch's office has been besieged with telephone calls from top-ranking officers in each branch of the military, requesting time with the senator to show him the error of his ways.

Three two-star generals appeared in person yesterday saying the amendment could destroy the military's esprit.

Allowing yarmulkes, the military has argued, would raise demands by other religious groups. The distinctive uniform requirements of war accords would be jeopardized and the military would be faced with the bureaucratic nightmare of deciding what headgear is unobtrusive and what is not, it contends.

"Jews are just one of 47 religious groups or subgroups in the military," one opponent of the amendment complained. "What we're talking about is the ability to control while in uniform 2 million people, not a group of religious sects who are showing religious differences while in uniform."

So far, none of it has persuaded Hatch, a deeply religious Mormon, who is uncomfortable opposing the military establishment.

"He's the last person who would harm the national security," said one aggrieved aide. "There is no more staunch supporter of the armed forces than Orrin Hatch."

According to aides, Hatch feels strongly that servicemen should not have to choose "between their sincere religious beliefs and their desire to serve their country." The House amendment and Hatch's stipulate that the headgear can not interfere with duty.